

2016

No Rest for the Weary: A Note on the Applicability of the Federal Extender Statute to State Statutes of Repose

Maria L. Sasinoski

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Maria L. Sasinoski, *No Rest for the Weary: A Note on the Applicability of the Federal Extender Statute to State Statutes of Repose*, 54 Duq. L. Rev. 243 (2016).

Available at: <https://dsc.duq.edu/dlr/vol54/iss1/10>

This Student Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

No Rest for the Weary: A Note on the Applicability of the Federal Extender Statute to State Statutes of Repose

*Maria L. Sasinoski**

I.	INTRODUCTION	243
II.	BACKGROUND	248
	A) <i>The 2008 Financial Crisis</i>	248
	B) <i>The Agencies' Statutory Authority as Receiver or Conservator</i>	251
	C) <i>The Agencies Argue That the Extender Statute Grants More Time to Sue</i>	253
	D) <i>Critical Distinctions Between Statutes of Limitations and Statutes of Repose</i>	255
III.	ARGUMENT	258
	A) <i>Two Distinct Scenarios</i>	258
	1) <i>Scenario 1: Statute of Repose Expires Before Date of Receivership</i>	258
	2) <i>Scenario 2: Statute of Repose Expires Before Date of Suit</i>	260
	B) <i>The Waldburger Court Held That CERCLA Section 9658 Does Not Preempt State Statutes of Repose</i>	260
	C) <i>The Tenth Circuit Explains that the Extender Statute is Not Like CERCLA</i>	261
	D) <i>The Supreme Court Has Historically Limited FIRREA to its Express Provisions</i>	263
IV.	CONCLUSION	266

I. INTRODUCTION

As of the writing of this note, billions of dollars in potential payouts are turning on a single question: Does the Federal Extender statute preempt state statutes of repose? If the answer is yes, Wall

* 2016 J.D. candidate, Duquesne University School of Law. The author wishes to thank Professor Steven Baicker-McKee for his unerring guidance and mentorship throughout the entire writing process. All errors and opinions are the author's own.

Street banks accused of swindling buyers of mortgage-backed securities will be forced to stay in court and defend those allegations. If the answer is no, that is, if the state statute of repose applies to the claims, the cases will be deemed untimely; those Wall Street banks can close the proverbial books on the allegations and put the disastrous years of the financial crisis behind them.

Although simple on its face, the question implicates foundational principles of the American legal system: that legal rights can be enforced against those who would seek to take that which lawfully belongs to another, that a person is entitled to his day in court, and that where there is a right there must be a remedy. These lofty aims are, however, often tempered by stark reality. In some cases—regardless of the diligence with which he may have pursued his rights—a plaintiff will find this social contract cannot always be fulfilled. An unhappy surprise awaits the litigant who files his complaint within the statute of limitations, only to find that his claim has already been extinguished by a statute of repose.¹ This plaintiff will be told that he has no recourse, that he no longer has a right to sue to recover what is his, and further, that the right was lost before he even suffered the harm. How could this be? This plaintiff has encountered that “‘unyielding and absolute barrier’ to a cause of action”: the statute of repose.²

As Judge Posner has noted, “[a] statute of repose is strong medicine, precluding as it does even meritorious suits because of delay for which the plaintiff is not responsible.”³ A simple shift in perspective, however, reveals the purpose of such a seemingly unjust rule: a statute of repose is not intended to harm the plaintiff, but rather is purposefully designed to protect the defendant.⁴ The statute reflects a legislative decision that—at some point in time—a defendant should have peace, that he should be able to put past events behind him, and that he should be free to move on with his personal and business affairs.⁵

1. “A statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury.” Statute of Repose, BLACK’S LAW DICTIONARY (9th ed. 2009).

2. *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011).

3. *Id.*

4. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (citation omitted) (“Statutes of repose effect a legislative judgment that a defendant should ‘be free from liability after the legislatively determined period of time.’”).

5. *Id.*

Although statutes of repose are not a new concept,⁶ a recent United States Supreme Court decision⁷ ignited new debates about the powerful and dispositive role these statutes can play to extinguish plaintiffs' claims in many areas of litigation, including ongoing toxic tort claims,⁸ claims filed under the Federal Tort Claims Act,⁹ and—as explored in this note—claims filed by government agencies to recoup billions of dollars lost during the 2008 mortgage-backed securities crisis.

In *CTS Corp. v. Waldburger*,¹⁰ the United States Supreme Court held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”)¹¹ does not preempt state statutes of repose. The reverberations of that ruling run deep—so deep, in fact, that the Court's statutory analysis impacts the trajectory of litigation for three separate government entities: the Federal Deposit Insurance Corporation (“FDIC”); the National Credit Union Administration Board (“NCUA”); and the Federal Housing Finance Agency (“FHFA”). In the wake of *Waldburger*, these agencies have been forced to fend off numerous defendants seeking to show that—

6. See Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALTIMORE L. REV. 119, 128 (2014) (explaining that many state legislatures—at the urging of insurance companies—enacted statutes of repose in the latter half of the twentieth century, and that statutes of repose were a direct response to advancements in tort law that dictated the statute of limitations should not begin to run until the plaintiff discovered (or “accrued”) the harm).

7. See generally *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014).

8. See, e.g., *Stahle v. CTS Corp.*, No. 1:14-CV-00048-MOC-DL, 2014 WL 6879393 (W.D.N.C. Dec. 4, 2014) (“While nothing would please this court more than to have a jury decide whether this plaintiff's serious illness was caused by exposure to chemicals allegedly dumped on to the land . . . by this defendant, to do so would require the court to ignore [precedent].”)

9. See, e.g., *Bryant v. United States*, 768 F.3d 1378 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 71 (2015) (applying *Waldburger* in the context of the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680, and holding that North Carolina's statute of repose could apply to extinguish claims made by thousands of Marines that they had been exposed to toxic drinking water while stationed at Camp Lejeune).

10. 134 S. Ct. 2175 (2014).

11. 42 U.S.C. § 9601 *et seq.*

like CERCLA's section 9658—the so-called “Federal Extender” statute¹² does not preempt state statutes of repose.¹³

A general trend has emerged. Federal district courts are consistently holding that the FDIC Extender Statute—like CERCLA's section 9658—is solely a statute of limitations, and is *not* a statute of repose.¹⁴ The NCUA and FHFA Extender Statutes, on the other

12. The term “Extender” statute is a semi-generic term used by courts to describe the time limitations under which these entities must bring their claims under certain chapters of Title 12 in the U.S. Code. For purposes of this note, “Federal Extender” or “Extender” statute will collectively describe the text of the FDIC Extender statute, 12 U.S.C. § 1821(d)(14)(A), the NCUA Extender statute, 12 U.S.C. § 1787(b)(14), and the FHFA Extender statute, 12 U.S.C. § 4617(b)(12)(A). The text of all three statutes is materially the same. The text of the FDIC Extender statute reads as follows:

Statute of limitations for actions brought by conservator or receiver

(A) In general. Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be— (i) in the case of any contract claim, the longer of— (I) the 6-year period beginning on the date the claim accrues; or (II) the period applicable under State law; and (ii) in the case of any tort claim (other than a claim which is subject to section 1441a(b)(14) of this title), the longer of (I) the 3-year period beginning on the date the claim accrues; or (II) the period applicable under State law. (B) Determination of the date on which a claim accrues.

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of— (i) the date of the appointment of the Corporation as conservator or receiver; or (ii) the date on which the cause of action accrues.

12 U.S.C.A. § 1821(d)(14)(A).

13. See, e.g., *NCUA v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014) (“*Nomura II*”) (decided Aug. 19, 2014) (challenging the applicability of *Waldburger* type statutory analysis as applied to the NCUA Extender Statute); *FDIC v. Chase Mortgage Fin. Corp.*, 42 F. Supp. 3d 574 (S.D.N.Y. 2014) (challenging the applicability of *Waldburger* type statutory analysis as applied to the FDIC Extender Statute); *FHFA v. HSBC N. Am. Holdings Inc.*, No. 11CV6189 DLC, 2014 WL 4276420 (S.D.N.Y. Aug. 28, 2014) (challenging *Waldburger* analysis as applied to the FHFA Extender Statute).

14. See e.g., *Chase*, 42 F. Supp. 3d 574 (S.D.N.Y. 2014); *FDIC v. Jones*, No. 2:13-CV-168-JAD-GWF, 2014 WL 4699511 (D. Nev. Sept. 19, 2014); Cf. *FDIC v. Bear Stearns Asset Backed Sec. I LLC*, 92 F. Supp. 3d 206 (S.D.N.Y. 2015) (holding Extender statute does not preempt federal statute of repose); *But see FDIC v. Williams*, No. 2:13-CV-00883, 2014 WL 5073605 (D. Utah Oct. 8, 2014) (not mentioning whether the Extender statute is one of limitations or repose); *FDIC v. Rhodes*, 336 P.3d 961, 968 (Nev. 2014) (declining to label the statute as either one of limitations or repose, but holding that—regardless of the label—the FDIC extender statute's time limitation “expressly preempts any shorter state statutory time limitation,” including Nevada's). In August 2014, the U.S. District Court for the Western District of Texas also held that the FDIC Extender statute did not preempt state statutes of repose, but—citing to multiple pre-*Waldburger* cases and the Nevada Supreme Court's *Rhodes* opinion—the Fifth Circuit recently reversed and remanded. See *FDIC v. Goldman, Sachs & Co.*, No. A-14-CA-129-SS, 2014 WL 4161567 (W.D. Tex. Aug. 18, 2014), *rev'd sub nom.* *FDIC v. RBS Sec. Inc.*, 798 F.3d 244 (5th Cir. 2015); *FDIC v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. A-14-CA-126-SS, 2014 WL 4161561 (W.D. Tex. Aug. 18, 2014), *rev'd sub nom.* *FDIC v. RBS Sec. Inc.*, 798 F.3d 244 (5th Cir. 2015); see also Nate Raymond, *US Banking Regulator Wins Revival of Mortgage Bond Lawsuits*, REUTERS, Aug. 10, 2015,

hand, are consistently held to be both statutes of limitations *and* statutes of repose.¹⁵

Much turns on this distinction; the decision could mean the difference between dismissal and years of protracted litigation resulting in potential billion dollar payouts.¹⁶ At its most basic, this particular disparity means that the FDIC's opponents—such as large Wall Street banks and small retail bank officers—can usually win their motions for dismissal on pure time preclusion grounds,¹⁷ while the NCUA and FHFA opponents—ironically, those same Wall Street banks against whom the FDIC is litigating—must defend on the merits.¹⁸ The most startling aspect of these polar opposite statutory interpretations is this: the text of all three statutes is essentially identical.¹⁹

Banks and bankers—those favorite defendants of the government since the 2008 mortgage-backed securities crisis²⁰—see the agencies' vulnerability in the situation. Sensing confusion and an opportunity, the bankers ask a reasonable question: if the golden rule of statutory interpretation is to apply the plain meaning of the text, how can it be that the same text is a statute of repose in one statute, but not the other?²¹

<http://www.reuters.com/article/mbs-lawsuit-idUSL1N10L2HQ20150810>. As of the writing of this article, a response on the banks' petition for *certiorari* is pending.

15. See e.g., *Nomura II*, 764 F.3d 1199; NCUA v. Morgan Stanley & Co., No. 13CV6705 DLC, 2014 WL 5017822 (S.D.N.Y. Sept. 30, 2014); HSBC, 2014 WL 4276420; FHFA v. Royal Bank of Scot. Group PLC, No. 3:11CV1383 (AWT), 2015 WL 4999912 (D. Conn. Aug. 21, 2015).

16. See, e.g., Devlin Barrett & Dan FitzPatrick, *J.P. Morgan, U.S. Settle for \$13 Billion*, WALL ST. J., (Nov. 19, 2013, 6:05 PM), <http://online.wsj.com/articles/SB10001424052702304439804579207701974094982> (detailing a landmark settlement entered into by J.P. Morgan before *Waldburger* was decided, and explaining, that, of J.P. Morgan's "\$13 billion settlement ... the bank will pay ... \$1.4 billion to settle federal and state claims by the National Credit Union Administration, \$515 million to settle Federal Deposit Insurance Corp. claims, [and] \$4 billion to settle Federal Housing Finance Agency claims . . .")

17. The existence of a tolling agreement complicates matters, as will be discussed later in this note. For cases dismissing FDIC claims because the state statute of repose was not pre-empted, see cases cited *supra* note 14.

18. See cases cited *supra* note 15.

19. Compare 12 U.S.C. § 1821(d)(14)(A), with 12 U.S.C. § 1787(b)(14), and with 12 U.S.C. § 4617(b)(12)(A).

20. The roots and history of the mortgage-backed securities crisis are beyond the scope of this note, however, for a brief overview, see *The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST, (Sept 7, 2013), <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article> [hereinafter *Crash Course*].

21. The disparity has been quite pronounced amongst judges in the Southern District of New York. Compare *HSBC*, 2014 WL 4276420 (Judge Cote holding on August 28, 2014 that the Extender statute *does* preempt state statutes of repose), with *Chase*, 42 F. Supp. 3d 574, 579 (Judge Stanton holding a week later that it does not), and with *Morgan Stanley & Co.*, 2014 WL 5017822 (Judge Cote reaffirming later that month that it does); see also *Bear*

This note will examine that question in light of the impact *Waldburger* has had on the efforts of the FDIC, the NCUA, and the FHFA to recover billions of dollars from Wall Street banks and retail bankers, all of which was lost during the 2008 financial crisis. This note will then discuss the arguments raised by the *Waldburger* majority and dissent, and will apply that logic to the Federal Extender statute in context of the Court's previous interpretation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") set forth in *O'Melveny & Myers v. FDIC*.²²

Finally, this note will conclude by advocating that Congress take immediate action to resolve what has become an untenable rift in the statutory interpretation of the Federal Extender Statute. In light of *Waldburger's* divisive impact on judicial interpretation of the Federal Extender statute, Congress must revisit the text of the Extender statute and enact new language clarifying whether it intended to preempt state statutes of repose. Barring Congressional action, both *Waldburger* and *O'Melveny & Myers* dictate that federal courts must take a stringent approach to interpreting the Extender statute. Accordingly, the federal judiciary must find that the Extender statute does not preempt state statutes of repose.²³

II. BACKGROUND

A) *The 2008 Financial Crisis*

In the months and years following the 2008 mortgage-backed securities crisis, Wall Street and the federal government began to triage and tally up their losses.²⁴ Lehman Brothers & Bear Stearns had collapsed, more than 500 retail banks—including IndyMac and Washington Mutual—had failed, and more than 8.8 million jobs had been lost.²⁵ Both Fannie Mae and Freddie Mac had been taken

Stearns, 92 F. Supp. 3d 206 (Judge Swain holding on March 24, 2015 that the Extender statute does not preempt federal statutes of repose, as found in Section 13 of the 1933 Act, 15 U.S.C. § 77m).

22. 114 S. Ct. 2048 (1994).

23. Although a discussion of preemption of federal statutes of repose is beyond the scope of this article, the reader will find that many of the cases cited *infra* also include a discussion on that topic.

24. See generally *Crash Course*, *supra* note 20 (explaining fall out from mortgage-backed securities crisis).

25. See DEPT. OF THE TREASURY, THE FINANCIAL CRISIS RESPONSE, IN CHARTS (April 2012), http://www.treasury.gov/resource-center/data-chart-center/Documents/20120413_FinancialCrisisResponse.pdf (explaining the impact of bank failures on the economy); see also FDIC, FDIC FAILED BANK LIST, <https://www.fdic.gov/bank/individual/failed/banklist.html> (last visited Apr. 19, 2015) (showing 510 retail banks failed between 2007 and 2014).

under conservatorship in the newly formed Federal Housing Finance Administration,²⁶ and the National Credit Union Administration was dealing with the failure of both corporate and consumer credit unions across the country.²⁷ In total, \$19.2 trillion dollars in household wealth had been destroyed.²⁸ In an unprecedented step in the era of modern banking, the task fell to the federal government to step in and prop up the United States economy.

Three government agencies emerged as the overseers of that effort: the Federal Deposit Insurance Corporation stepped into the shoes of the 500+ failed retail banks; the Federal Housing Finance Authority assumed control of Fannie Mae and Freddie Mac (both of which are Government Sponsored Entities originally tasked with ensuring liquidity and interest rate stabilization in the mortgage market); and—in addition to taking a number of small consumer credit unions into conservatorship—the National Credit Union Administration assumed conservatorship of five failed corporate credit unions, each of whom had contributed to losses in the billions of dollars due to failed bets on mortgage-backed securities.²⁹ The immediate need was of course, to stabilize the organizations and prevent further loss of assets. But, soon each agency's search for culpable parties began.

Although an in-depth discussion of the 2008 financial crisis is beyond the scope of this article, a brief digression may help to illustrate the players and the stakes. The nature of the mortgage-backed securities meltdown has been likened to a massive Ponzi scheme.³⁰ One might think of it as a machine: there are the raw

26. The Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Service Corporation ("Freddie Mac") are Government-Sponsored Enterprises ("GSE's") that have historically been tasked with bringing liquidity and interest rate stabilization to the mortgage market, thereby letting more people finance the purchase of a home. See FEDERAL HOUSING FINANCE AGENCY, OFFICE OF THE INSPECTOR GENERAL, HISTORY OF THE GOVERNMENT SPONSORED ENTERPRISES, <http://fhfaoig.gov/LearnMore/History> (last visited Apr. 19, 2015).

27. See GAO, NATIONAL CREDIT UNION ADMINISTRATION: EARLIER ACTIONS ARE NEEDED TO BETTER ADDRESS TROUBLED CREDIT UNIONS (Jan. 2012), <http://www.gao.gov/assets/590/587410.pdf> (explaining that 5 corporate credit unions and 85 consumer credit unions failed between January 1 2008 and June 30, 2011, and that corporate credit unions lost billions of dollars by investing in mortgage-backed securities that they presumably thought were high quality assets).

28. *The Financial Crisis Response*, *supra* note 25, chart 1.

29. See *supra* notes 20, 24–28 and accompanying text for a brief history on the 2008 financial crisis.

30. See MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* 158 (2010); Charles Ferguson, *Heist of the Century: Wall Street's Role in the Financial Crisis*, THE GUARDIAN, May 20, 2012, <http://www.theguardian.com/business/2012/may/20/wall-street-role-financial-crisis>; see also Kaushik Basu, *The Ponzi Economy*, SCI. AM., Jun. 2014, at 70–75, <http://www.scientificamerican.com/article/the-whole-economy-is-rife-with-ponzi>.

materials, (John and Jane Homeowner's desire for cash or a house), which are fed into the engine (the Subprime Mortgage Lender's easy approvals, with no money down and adjustable rate mortgages), which are quickly processed (no documentation? you're approved!), and then sent to the packaging department (Wall Street investment firms like Goldman Sachs, Bear Stearns, Lehman Brothers, etc...). Next, John and Jane's individual mortgage is bundled with other mortgages into a single product (a Mortgage-Backed Security, for example), which is inspected and given a seal of approval (Investment Grade!) by the inspections department (S&P, Moodys, etc...), and then marketed and sold by the marketing department (that same Wall Street firm or some other Securities Underwriter) to the end consumer (corporate credit unions, Freddie Mac, Fannie Mae, firefighters and policemen pension funds, municipal funds, etc...) as a high quality product that will produce a relatively safe, steady stream of income.³¹

All works well, the engine continues to hum along and everyone makes money, until John and Jane Homeowner are hit with their first balloon payment and stop paying their mortgage. There is no crisis yet, after all, there are many other mortgages—many other streams of income—other than John and Jane's in the pool, but then another homeowner defaults, and another, and another. Suddenly, the great economic engine is no longer running but has come to a grinding halt, with the end consumer—corporate credit unions, Freddie Mac, Fannie Mae, and other investors—left holding a massive portfolio of “investment grade” securities that have been rendered worthless.³²

schemes/ (explaining the nature of Ponzi schemes and arguing that they are “natural phenomena” occurring within the global finance markets, driven by the irrational and optimistic expectation of investors that prices will continue to rise).

31. This description is derived from Michael Lewis' excellent book on the 2008 financial crisis. See LEWIS, *supra* note 30, at 76, 90 (referring to the creation of these assets as a “new money machine” and a “subprime mortgage machine”).

32. See Crash Course, *supra* note 20:

When America's housing market turned, a chain reaction exposed fragilities in the financial system. Pooling and other clever financial engineering did not provide investors with the promised protection. Mortgage-backed securities slumped in value, if they could be valued at all. Supposedly safe CDOs turned out to be worthless, despite the ratings agencies' seal of approval. It became difficult to sell suspect assets at almost any price, or to use them as collateral for the short-term funding that so many banks relied on. Fire-sale prices, in turn, instantly dented banks' capital thanks to “mark-to-market” accounting rules, which required them to revalue their assets at current prices and thus acknowledge losses on paper that might never actually be incurred.

This chain reaction triggered the worst financial crisis since the Great Depression.³³ Wall Street began to collapse, retail banks began to fail, and many Americans lost their homes.³⁴ Against this backdrop, the FDIC, the NCUA, and the FHFA stepped in to assume control of failed retail banks, massive corporate credit unions, Freddie Mac, and Fannie Mae.³⁵

B) The Agencies' Statutory Authority as Receiver or Conservator

Although the agencies obtain their authority from different federal statutes, much of the language granting their powers and rights with regard to a distressed institution is essentially the same.³⁶ The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the Federal Credit Union Act ("FCUA"), and the Housing and Economic Recovery Act of 2008 ("HERA") grant authority to the FDIC, the NCUA, and the FHFA to act as a receiver or conservator for the institutions for which each agency is responsible.³⁷ The FDIC "steps into the shoes" of distressed or failed retail banks, the NCUA "steps into the shoes" of distressed or failed corporate and consumer credit unions, and the FHFA "steps into the shoes" of Fannie Mae and Freddie Mac (both of which have been distressed since 2008).³⁸

When acting as a receiver or conservator, the agency can "sue and be sued" as though it is the institution itself.³⁹ Notably, when one of these three government agencies acts as a receiver or conservator of the distressed institution, it "immediately succeeds to all rights

33. See Tim Worstall, *Ben Bernanke: The 2008 Financial Crisis was Worse than the Great Depression*, FORBES (Aug. 27, 2014, 11:36 AM), <http://www.forbes.com/sites/timworstall/2014/08/27/ben-bernanke-the-2008-financial-crisis-was-worse-than-the-great-depression/>.

34. See *supra* notes 20, 24–28 and accompanying text for a brief history on the 2008 financial crisis.

35. See *supra* notes 20, 24–28 and accompanying text for a brief history on the 2008 financial crisis.

36. See *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 93 (D.D.C. 2012) (explaining that "Section 1821(d)(2)(A) & (B) of FIRREA, regarding the power and rights of conservators and receivers, is almost identical to § 4617(b)(2)(A) & (B) of HERA").

37. See generally 12 U.S.C. § 1821(d); 12 U.S.C. § 4617(b); 12 U.S.C. § 1787(b) (generally explaining powers and duties granted in capacity as receiver or conservator).

38. See *Nomura II*, 764 F.3d at 1203 (citation omitted) (explaining that, upon taking over as conservator, the NCUA "steps into the shoes of the credit union and succeeds to 'all rights, titles, powers, and privileges of the credit union....'"); *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 93 (D.D.C. 2012) (explaining that the FDIC and the FHFA do the same with regard to their underlying institutions).

39. See 12 U.S.C. § 1819 (FDIC); 12 U.S.C. § 1766 (NCUA) (including any right to sue on behalf of the corporation); *In re Fed. Home Loan Mortgage Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 797 (E.D. Va. 2009), *aff'd sub nom.* *La. Mun. Police Emp. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011).

and powers of the stockholders, officers, and directors of the regulated entity,” and ceases to behave as a “government actor.”⁴⁰ This means that, once the agency takes the troubled institution under conservatorship, it can also take all steps necessary to collect and protect the institution’s assets, including filing suit against those who harmed the institution.⁴¹

Having seen to the immediate stabilization needs, the government agencies focused their efforts on litigation designed to recoup their “staggering losses.”⁴² The government coffers had been extensively drained: the FDIC Deposit Insurance Fund lost an estimated \$83 billion dollars due to bank failures between 2008 and 2013,⁴³ and the FHFA required an investment of \$189 billion from the U.S. Treasury to avert the collapse of Fannie Mae and Freddie Mac in the days following the crisis.⁴⁴ Given the number and complexity of the issues in play, the agencies in many cases sought to execute tolling agreements with potential defendants in order to pause the running of the statute of limitations.⁴⁵ The FDIC has explained that it frequently executes tolling agreements with potential defendants, and relies on those agreements to give the FDIC more time to investigate complex issues and determine if it will actually file a claim.⁴⁶

Upon completing their investigation of the underlying issues, the agencies eventually began to file lawsuits. The agencies focused their cases on two types of defendants, (1) Wall Street Securities

40. *Herron*, 857 F. Supp. 2d at 94.

41. *See supra* note 39 and accompanying text.

42. *Nomura II*, 764 F.3d at 1204.

43. *See* Memorandum from Diane Ellis, Director FDIC Division of Ins. and Res. to FDIC Board of Directors (Oct. 2, 2014), https://www.fdic.gov/deposit/insurance/2014-10-02_notice_dis_d_mem.pdf.

44. FHFA, *FHFA as Conservator of Fannie Mae and Freddie Mac*, FHFA.GOV, <http://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx> (last visited Jan. 4, 2015).

45. A tolling agreement is “an agreement between a potential plaintiff and a potential defendant by which the defendant agrees to extend the statutory limitations period on the plaintiff’s claim, usually so that both parties will have more time to resolve their dispute without litigation.” Tolling Agreement, BLACK’S LAW DICTIONARY (9th ed. 2009).

46. *See* FDIC Receivership Mgmt. Program: 2008–2013 Strategic Plan (Nov. 21, 2008), <https://www.fdic.gov/about/strategic/strategic/receivership.html>:

Each potential claim has a statute of limitations that establishes a time limit for the claim to be filed. A substantial increase in the number of failures could make it difficult to complete investigations of all potential claims and make decisions within the established time limit on whether to pursue a claim. The same problem could occur with very complex investigations or claims. In such cases, the FDIC will generally seek to enter into a tolling agreement with the potential defendant to extend the allowable time frame for the claim to be filed.

Underwriters and (2) Directors and Officers of retail banks.⁴⁷ Alleging misrepresentation and fraud, the NCUA and the FHFA primarily sued the Securities Underwriters—those Wall Street firms who had published the securities prospectus and actually marketed the product to the credit unions, Fannie Mae, and Freddie Mac as relatively safe streams of investment income.⁴⁸ The FDIC filed similar suits for its retail banks that had been unfortunate enough to also buy those toxic securities.⁴⁹ In addition to its own suits against the Wall Street firms, the FDIC also pursued another type of defendant—the directors and officers of its failed retail banks that had made the risky loans in the first place.⁵⁰ In many cases, the agencies were able to settle, and recovered substantial sums from the banks.⁵¹ In 2013–14, the FHFA alone recovered more than \$18 billion dollars from settlements with big Wall Street firms.⁵² Unfortunately for these government agencies, and in spite of the fact that they had executed tolling agreements extending the statute of limitations, the time in which they could bring suit was quickly running out.

C) *The Agencies Argue That the Extender Statute Grants More Time to Sue*

Upon assuming control of a failed institution, the FDIC, NCUA, and FHFA typically have six years under the statute of limitations to bring a contract claim, and three years under the statute of limitations to bring a tort claim, assuming the institution's claim

47. See cases cited *supra* notes 13–15.

48. See cases cited *supra* note 15.

49. See cases cited *supra* note 14.

50. Between 2009 and 2014, the FDIC authorized professional liability suits against 1,181 Directors and Officers of failed institutions, resulting in 104 lawsuits against 793 former Directors and Officers. In addition to those suits against individuals, the FDIC further authorized 140 suits related to residential mortgage-backed securities and mortgage fraud. See Federal Deposit Insurance Corporation, *Professional Liability Lawsuits*, FDIC.GOV, <https://www.fdic.gov/bank/individual/failed/pls/> (last visited Jan. 4th, 2015).

51. See Federal Housing Finance Administration, *Private Label Securities Actions*, FHFA.GOV, <http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFAs-Update-on-Private-Label-Securities-Actions.aspx> (last visited Jan. 4, 2015).

52. *Id.*

against the third party had not already lapsed by the date the institution was taken under control.⁵³ This provision is typically referred to as the Federal Extender statute.⁵⁴ Although the three agencies' individual Extender statutes are codified in different sections of Title 12 of the U.S. Code, as mentioned, the language conferring this extra grant of time is basically identical.⁵⁵

While it is considered settled law that the Extender statute preempts any shorter state statute of limitations, it has become a hotly contested issue as to whether the Extender statute also preempts a state statute of repose.⁵⁶ Billions of dollars can turn on the semantics: if the plaintiffs can convince the court that the Extender statute is *both* a statute of limitations and a statute of repose—or as some agencies argue, a “universal time frame,”⁵⁷ those plaintiffs can usually fend off defendants' motions to dismiss for lack of timeliness.⁵⁸ But, if the plaintiffs fail to convince the court that the Extender statute is the one and only timeframe controlling their claims, then the defendants can wield the statute of repose as a shield to ward off the plaintiffs' attack.⁵⁹ If the court finds that the state statute of repose applies, and if its time has run, then the FDIC, the NCUA, and the FHFA's claims against their defendants will be extinguished.⁶⁰

Before delving into the arguments each side proffers to support its view that the Extender statute does or does not preempt, it is important to review the primary differences between statutes of limitations and statutes of repose.

53. See statutes cited *supra* note 12 and accompanying text. Interestingly, the FDIC and the FHFA Extender Statute appear to include provisions that revive dead state law claims in certain cases, however the agencies do not appear to be citing to this provision in the cases. See *infra* note 85 and accompanying text; see also *NCUA v. Morgan Stanley & Co.*, No. 13 Civ. 6705(DLC), 2014 WL 241739, at *10 (S.D.N.Y. Jan. 22, 2014) (“The NCUA Extender Statute does not resuscitate barred claims; it merely extends the statute of limitations for open claims by three years.”).

54. See statute cited *supra* note 12 and accompanying text.

55. See statute cited *supra* note 12 and accompanying text.

56. See Alison Frankel, *In MBS Litigation, NCUA is FHFA's Mini Me*, REUTERS (Feb. 22, 2013), <http://blogs.reuters.com/alison-frankel/2013/02/22/in-mbs-litigation-ncua-is-fhfas-mini-me/> (explaining the numerous suits that have been filed by the corporate defendants, and the conflicting answers courts are giving when deciding whether the Extender statute is a statute of repose).

57. *Nomura II*, 764 F.3d at 1203.

58. See *supra* note 15.

59. See *supra* note 14.

60. Cf. *McCann v. Hy-Vee, Inc.*, 663 F.3d 926 (7th Cir. 2011).

D) Critical Distinctions Between Statutes of Limitations and Statutes of Repose

Although statutes of repose and statutes of limitations are similar in that they are both designed to limit the time in which a plaintiff may file suit, several crucial differences exist: (1) the statutes have different triggering factors;⁶¹ (2) the statutes are intended to serve different purposes;⁶² (3) statutes of limitations are procedural in nature, while statutes of repose are substantive;⁶³ and (4) a statute of limitations may be subject to legal and equitable tolling, while a statute of repose is usually not.⁶⁴

First, the statutes have different triggering mechanisms.⁶⁵ A statute of limitations is measured from the perspective of the plaintiff; the clock begins to run on a statute of limitations when the plaintiff's claim "accrues," that is, when all elements of his cause of action become complete.⁶⁶ In some cases, a cause of action does not accrue until the date a plaintiff knows or should know that he has a claim; this rule is commonly referred to as the "discovery rule."⁶⁷ So, for example, if a homeowner discovers that his well water is contaminated with Trichloroethylene supposedly deposited many years ago by a neighboring manufacturing plant, the statute of limitations begins to run as of the date the homeowner became aware of the contamination.⁶⁸

A statute of repose, on the other hand, is measured from the perspective of the defendant.⁶⁹ The statute is not triggered by the plaintiff's discovery of the harm, but is instead triggered by some

61. See *CTS v. Waldburger*, 134 S. Ct. 2175, 2182–84 (2014).

62. *Id.*

63. See *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir. 2013) (citation omitted) ("[I]n contrast to statutes of limitations, statutes of repose 'create a substantive right in those protected to be free from liability after a legislatively-determined period of time.'").

64. See *Waldburger*, 134 S. Ct. at 2182–84.

65. *Id.*

66. See *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (absent legislation stating otherwise, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief.")

67. Black's Law Dictionary defines the Discovery Rule as "[t]he rule that a limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim. The discovery rule usually applies to injuries that are inherently difficult to detect." Discovery Rule, BLACK'S LAW DICTIONARY (9th ed. 2009).

68. See *Waldburger*, 134 S. Ct. at 2182; *Waldburger v. CTS Corp.*, 723 F.3d 434, 441 (4th Cir. 2013) *cert. granted*, 134 S. Ct. 896 (2014) and *rev'd on other grounds*, 134 S. Ct. 2175 (2014).

69. See *Waldburger*, 134 S. Ct. at 2182–83 ("That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant. . . . [I]t embodies the idea that at some point a defendant should be able to put past events behind him.").

last act or omission of the defendant.⁷⁰ In the earlier example, the statute of repose would be triggered by the last date the manufacturer deposited chemicals, or perhaps the last date on which the manufacturer owned the property.⁷¹ The exact triggering factor itself will be defined by the state statute of repose, but the nature of the statute of repose is that it exists independently of any harm incurred by the plaintiff; the clock can only be triggered by the defendant's acts or omissions.⁷²

This brings us to the second crucial difference between a statute of limitations and a statute of repose: the purpose of the statutes. A statute of limitations is designed to ensure that a plaintiff does not sit on his rights; a statute of repose is designed to ensure that a defendant not be subject to perpetual liability—that he can in fact move on and set the past behind him.⁷³ Similar to “a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability.”⁷⁴ The *Waldburger* court explained that “[s]tatutes of repose effect a legislative judgment that a defendant should ‘be free from liability after the legislatively determined period of time.’”⁷⁵

Third, a statute of limitations is merely procedural in nature, but a statute of repose is substantive.⁷⁶ If a statute of limitations has run, it's understood that the plaintiff had a vested claim, but the time permitted to bring suit has simply passed.⁷⁷ If a statute of repose has run, the plaintiff either had no vested claim (because the repose period ended before the statute of limitations began), or any vested claim he may have had has been terminated (because the repose period ended before he sued).⁷⁸ In sum, after the statute of

70. *Id.*

71. See cases cited *supra* note 68 and accompanying text.

72. *Waldburger*, 134 S. Ct. at 2182–83.

73. *Id.*

74. *Id.* at 2183.

75. *Id.* (quoting 54 C.J.S., *Limitations of Actions* § 7, p. 24 (2010)).

76. See 54 C.J.S., *Limitations of Actions* § 29 (2015) (“Unlike a statute of limitations, a statute of repose is not merely a limitation of a plaintiff’s remedy but defines the right involved in terms of the time allowed to bring suit.”); *Prasad v. Holder*, 776 F.3d 222, 227 (4th Cir. 2015) (“[C]onferral of a substantive right or immunity from substantive liability is the work of a statute of repose, not a statute of limitations.”). But see *FHFA v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 316 (S.D.N.Y. 2012), *aff’d*, 712 F.3d 136 (2d Cir. 2013) (citing *Jinks v. Richland County*, 538 U.S. 456, 465 (2013) (noting that the “Supreme Court has rejected defendants’ argument that state statutes of limitation should be considered ‘procedural’ for purposes of federalism analysis”)).

77. *Supra* note 76 and accompanying text.

78. *Supra* note 76 and accompanying text.

repose period runs its course, the plaintiff *no longer has any substantive right to enforce*, thus, his cause of action has been entirely extinguished.⁷⁹

The fact that a limitations period is merely procedural, while a repose period is substantive, drives the fourth and final major distinction: tolling. While a statute of limitations may be subject to tolling,⁸⁰ most courts hold that a statute of repose cannot be tolled.⁸¹

This difference is crucial for agencies like the FDIC, the NCUA, and the FHFA. Because these agencies frequently seek to enter into tolling agreements with potential defendants, it could be argued that this particular feature of a statute of repose poses the greatest threat to the agencies' ability to recover from liable parties.⁸² If a statute of repose may not be tolled, then it essentially means that all of the tolling agreements the agencies have been entering into with defendants do not provide the protection previously thought.⁸³ After all, what good is it to have a statute of limitations extended, if the agency finds it is still barred by the statute of repose?

Although the *Waldburger* Court did not address the issue of whether a tolling agreement itself could extend a statute of repose, the Tenth Circuit recently held that contractual tolling agreements are ineffective against the Extender Statute.⁸⁴ The court also held,

79. *Supra* note 76 and accompanying text.

80. The Seventh Circuit has previously stated that neither equitable tolling nor equitable estoppel apply to a statute of repose. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) ("The rule in the federal courts is that both tolling doctrines—equitable estoppel and equitable tolling—are, just like the discovery rule, grafted on to federal statutes of limitations . . . [t]o this as to most legal generalizations, there are exceptions. Neither tolling doctrine applies to statutes of repose.").

81. *See id.*; *CTS v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (Unlike statutes of limitations, "statutes of repose . . . generally may not be tolled, even in cases of extraordinary circumstances."). *See also FHFA v. UBS Americas Inc.*, which states that:

Statutes of limitations limit the availability of remedies and, accordingly, may be subject to equitable considerations, such as tolling, or a discovery rule. In contrast, statutes of repose affect the underlying right, not just the remedy, and thus they "run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action."

712 F.3d 136, 140 (2d Cir. 2013) (quoting *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004)).

82. *See* FDIC Receivership Mgmt. Program, *supra* note 46 and accompanying text. In the event of wide-scale failures or complex investigations, the FDIC will seek to enter into tolling agreements with potential defendants to pause the running of the statute of limitations, and therefore extend the time frame in which the claim can be filed.; the NCUA and the FHFA employ a similar strategy with regard to tolling agreements.

83. *See generally* FDIC Receivership Mgmt. Program *supra* note 46 and accompanying text.

84. *See Nat'l Credit Union Admin. Bd. v. Barclays Capital, Inc.*, 785 F.3d 387, 392 (explaining that the "notwithstanding any provision of any contract" language in the Extender

however, that the defendant's promise to not sue on time limitations grounds could be enforced through estoppel: because the defendant had repeatedly promised not to assert a statute of limitations defense, the court estopped the defendant from doing so, and denied the plaintiff's motion to dismiss.⁸⁵ Although the agency won this round, the Tenth Circuit's decision casts doubt on the future viability of the FDIC, NCUA, and FHFA's tolling agreements within the Circuit.⁸⁶ This will be an interesting trend to follow as the case law on this issue develops.⁸⁷

Having discussed the primary differences between statutes of limitations and repose, the scene is set to examine these concepts in the context of federal preemption.

III. ARGUMENT

A) *Two Distinct Scenarios*

When addressing the question of whether the Extender statute preempts the state statute of repose, two potential scenarios merit attention. In the first, the statute of repose has ended before the agency took the failed bank into receivership, but the statute of limitations is still alive. In the second, both the statute of repose and the statute of limitations are alive when the agency takes the failed bank into receivership.

1) *Scenario 1: Statute of Repose Expires Before Date of Receivership*

In the first scenario, the analysis should not reach the question of preemption, as the claim was dead before preemption could even

Statute "amounts to an express statement that the Extender Statute's limitations periods cannot be tolled by agreement.").

85. *Id.* at 393; *see also* FDIC v. Coleman, No. 1:14-CV-00310-CWD, 2015 WL 476234 (D. Idaho Feb. 5, 2015) (unpublished). *Coleman* held that the doctrine of equitable estoppel would apply to bar the defendants from arguing the tolling agreement was invalid to extend the limitations period:

It is reasonable to infer that Defendants' promises induced the FDIC-R to delay filing suit. Further, there is no evidence suggesting that the FDIC-R had any reason to believe that Defendants would not honor the Tolling Agreement. Thus, the undisputed facts before the Court establish that equitable estoppel applies and precludes Defendants from asserting the FDIC-R's claims are time-barred.

Id. at *8. *But see Waldburger*, 134 S. Ct. at 2183 ("a repose period is fixed and its expiration will not be delayed by estoppel . . .").

86. *Barclays Capital, Inc.*, 785 F.3d at 392.

87. The Tenth Circuit's reasoning in *Barclays* seems to negate the effectiveness of tolling agreements under the Dodd-Frank Act's Extender Statute too, as Dodd-Frank contains the same "notwithstanding any provision of any contract" clause. *Compare* Dodd-Frank Wall Street Reform Act, 12 U.S.C. § 5390(a)(10)(A), *with* 12 U.S.C. § 1787(b)(14)

have applied. While the Extender statute can extend a viable claim, it cannot revive a dead claim.⁸⁸ The distinction is crucial with regard to agencies acting in their capacity as receivers of failed institutions. Because the agencies merely “step into the shoes” of the failed institution, they have only those rights that existed at the time they assumed control. No new rights or powers are conferred upon the receiver agency, and therefore the agency may only sue and be sued on those causes of action that the failed bank itself could have at the time.⁸⁹ This, therefore, is not a question of whether the Extender statute preempts time limits. Rather, the proper question in this scenario is whether the failed bank—and by proxy the receiver agency—had any right to sue at all on those claims at the time of receivership.

The argument that a statute of repose can even *be* preempted only makes sense if one assumes that the statute of limitations will always expire before the statute of repose runs out. But, as demonstrated by *Waldburger* and several other decisions, that is not always the case. Sometimes the statute of repose can expire earlier than the statute of limitations.⁹⁰ This happens when the statute of limitations has been tolled for a period of time due to the plaintiff having not yet discovered the harm.⁹¹ Applying that concept to the Extender statute, it becomes clear that if the statute of repose had run before the time the bank was taken into receivership, then the failed bank itself could not have sued. If the failed bank itself could not have sued at that point in time, then nor could the receiver

88. There is an exception to this general statement. The FDIC and FHFA Extender Statutes specifically provide that some state law tort claims can be revived. See 12 U.S.C. § 1821(d)(14)(C); 12 U.S.C. § 4617(b)(13)(A):

In the case of any tort claim described under [the Extender Statute] for which the statute of limitations applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Agency as conservator or receiver, the Agency may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitations applicable under State law.

Id. Judge Cotes of the Southern District of New York has pointed out that the FHFA seems to have forgotten to take advantage of this provision. See *FHFA v. UBS Americas, Inc.*, No. 11 CIV. 5201 DLC, 2012 WL 2400263, at *1 (S.D.N.Y. June 26, 2012), where the court, in an unpublished opinion, avoided this issue by holding that the statute of repose had started to run as of a later date, and that therefore the federal securities claim was still viable as of the date the FHFA had taken Fannie Mae and Freddie Mac into conservatorship.

89. See *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 966 F. Supp. 2d 1018, 1021 (C.D. Cal. 2013) *reconsideration denied*, 966 F. Supp. 2d 1031 (C.D. Cal. 2013) (“Under FIRREA, it is [state] law that defines the existence and scope of the right that the FDIC received from [the failed bank].”)

90. See, e.g., *Waldburger*, 134 S. Ct. 2175.

91. *Id.*

agency.⁹² Accordingly, under scenario one, the courts must evaluate the issue on grounds other than preemption.

2) *Scenario 2: Statute of Repose Expires Before Date of Suit*

The second scenario, then, is truly the scenario where the preemption analysis is proper. In this scenario, the failed bank itself could have sued the defendant as of the date of receivership, as both the statute of limitations and the statute of repose were still running. Because the failed bank had the right to sue as of that date, so too, does the receiver agency have the right to sue when it “steps into the shoes” of the failed bank.⁹³

B) *The Waldburger Court Held That CERCLA Section 9658 Does Not Preempt State Statutes of Repose*

Although federal courts recognize that the NCUA, FHFA, and FDIC Extender statutes are virtually identical, the courts divide on whether the *Waldburger* statutory analysis applies to the Extender statute at all.

In *Waldburger*, the Supreme Court addressed whether CERCLA section 9658 preempted state statutes of repose.⁹⁴ In that case, a group of North Carolina homeowners discovered their well water had high traces of chemicals, which they believed were pollutants left by electronics manufacturer CTS Corporation. CTS Corporation had sold the plant—*i.e.* committed its last “culpable act”—in the late 1980s, which meant that North Carolina’s 10-year statute of repose had already passed long before Peter Waldburger purchased the property, let alone discovered the harm.⁹⁵ Waldburger and his co-plaintiffs argued that CERCLA’s remedial nature meant that North Carolina’s 10-year rule did not apply, that is, that they should still be entitled to sue CTS to recover damages for the environmental cleanup.⁹⁶ The Court granted *certiorari* to resolve a widening circuit split on the question of whether CERCLA preempts state statutes of repose.⁹⁷

92. *But see supra* note 88 and accompanying text.

93. *See Nomura II*, 764 F.3d at 1203; *Herron*, 857 F. Supp. 2d at 93.

94. *See* 134 S. Ct. at 2175.

95. *Id.*

96. *Id.*

97. *Id.*

The Court's statutory analysis examined the text itself, as well as the legislative history, the purpose of the statute, and the differing aims of statutes of limitations versus statutes of repose.⁹⁸ In holding that CERCLA's statutory text did not preempt North Carolina's 10-year statute of repose, the Court's decision rested on the fact that "Congressional intent is discerned primarily from the statutory text;" given that the text did not mention statutes of repose, and further noting the substantial differences in their operation compared with a statute of limitations, the Court held that to find preemption would also require it to find "that statutes of repose ... cease to serve any real function."⁹⁹ Ultimately, the Court was not willing to negate state legislative decisions in the face of Congressional silence.

As a result of this holding, CTS Corporation, which allegedly polluted much of the land on which the homeowners now lived and drew their groundwater, saw the case dismissed. In her dissent, Justice Ginsberg logically reasoned that the court had eviscerated any objective that Congress may have intended, as Congress' sole purpose in enacting the statute had been to allow people like the Waldburgers to recover damages for pollution discovered many years later.¹⁰⁰ Upon deciding Waldburger, the Supreme Court reversed and remanded, for further consideration, a prior Tenth Circuit case, *Nomura I*, which had previously held that the Federal Extender statute preempted state statutes of repose.¹⁰¹

C) *The Tenth Circuit Explains that the Extender Statute is Not Like CERCLA*

On reconsideration, the *Nomura II* court affirmed its original holding and reinstated its original opinion that the Extender Statute trumps state statutes of repose.¹⁰² This surprising decision drove a wedge deeper into an already wide split amongst the federal district courts. Oddly, when deciding whether the Extender statute preempted state statutes of repose, the courts had split not along circuit or even district lines, but instead along federal agency

98. *Id.*

99. *Id.* at 2185, 2189.

100. *See* 134 S. Ct. at 2191.

101. *See* Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1273 (10th Cir. 2013) ("*Nomura I*") *cert. granted, judgment vacated*, 134 S. Ct. 2818 (2014). *Nomura I* held that the Federal Extender Statute preempted state statutes of repose.

102. *See Nomura II*, 764 F.3d 1199.

lines.¹⁰³ Those courts evaluating the FDIC claims came to consistently hold that the Extender statute did not preempt statutes of repose, while the courts evaluating the exact same language with regard to the NCUA and FHFA claims consistently arrived at the opposite conclusion.¹⁰⁴

In a twist of irony, it could be said that the reason for the odd district court split also comes down to timing. The United States District Court for the Western District of Texas issued its holding on the FDIC extender statute on August 18th, 2014—a single day before the Tenth Circuit issued *Nomura II*.¹⁰⁵ While the Western District of Texas is of course not bound by decisions from the Tenth Circuit, the contemporaneous consideration of the cases meant that neither court had the benefit of the other's decision to rely upon when ruling on these very similar issues. The Western District of Texas held the exact opposite with regard to the FDIC Extender Statute than the Tenth Circuit did with regard to the NCUA Extender Statute. While *Nomura* was forced to stay and defend in the Tenth Circuit, Merrill Lynch and Goldman's cases in the Western District of Texas were dismissed with prejudice.¹⁰⁶ The Fifth Circuit's reversal and remand of the FDIC cases back to the Western District of Texas has now aligned the Fifth Circuit and the Tenth Circuit on this issue, although a request for *certiorari* is pending.¹⁰⁷

This drama played out again within in the United States District Court for the Southern District of New York a mere ten days later, when Judge Cote sided with the *Nomura II* court in holding that the FHFA Extender statute also preempts state statutes of repose.¹⁰⁸ The following Tuesday, Judge Stanton of the Southern District of New York sided with the Western District of Texas in holding that the FDIC Extender statute does not preempt.¹⁰⁹ The litigants in Judge Cote's courtroom (HSBC North America Holdings, Inc.) were forced to stay and defend, while the litigants in Judge Stanton's courtroom (Chase Mortgage Finance Corporation) went home.¹¹⁰

The different stances these courts take generally echo the arguments of the *Waldburger* majority and dissent. In comparing the

103. See cases cited *supra* notes 14, 15.

104. See cases cited *supra* notes 14, 15.

105. See cases cited *supra* notes 14, 15.

106. Compare *Nomura II*, 764 F.3d 1199 with *Merrill Lynch*, 2014 WL 4161561 and with *Goldman, Sachs & Co.*, 2014 WL 4161567.

107. See cases cited *supra* notes 14, 15 and accompanying text.

108. See *HSBC*, 2014 WL 4276420.

109. See *Chase*, 42 F. Supp. 3d at 579.

110. See cases cited *supra* notes 10809 and accompanying text.

Extender statute to CERCLA section 9658, the district courts hearing the FDIC claims apply the *Waldburger* majority analysis and arrive at the *Waldburger* majority result. These courts evaluate the text of the statute and examine the legislative history and statutory purpose. In doing so, these courts rely on the subtle yet substantial differences between a statute of limitations and repose to ultimately conclude that Congress demonstrated no legislative intent to preempt the states' laws regarding repose.¹¹¹

In contrasting the Extender statute from CERCLA section 9658, the courts hearing NCUA and FHFA claims distinguish *Waldburger* and arrive at the opposite result.¹¹² Like Justice Ginsburg's dissent, these courts reason that Congress wrote a remedial statute for the purpose of protecting the public from harms that may not come to light for many years, and thus the Extender statute must preempt any and all shorter state timeframes.¹¹³ In stressing function over form, these courts explain that the terms—statute of limitations, statute of repose—do not matter as much as the purpose for which the Extender statute was enacted.¹¹⁴ These courts hold that the Extender statute's "universal time frame" preempts state law, regardless of what terms the state legislature may have used to limit the timeframe in which its citizens can be sued.¹¹⁵

D) The Supreme Court Has Historically Limited FIRREA to its Express Provisions

The Supreme Court has addressed the question of the scope of the FDIC's preemptive authority under FIRREA before. In *O'Melveny & Myers*, the Court explained that there are three questions to ask when determining whether federal or state law controls: (1) whether the text of the federal statute is explicit on the subject; (2) whether the "federal statutory regulation . . . is comprehensive and detailed," in which case the court assumes that "matters left unaddressed" are to be decided under state law; and (3) whether the FDIC is suing in its capacity as a receiver, as opposed to suing in

111. See cases cited *supra* note 14 and accompanying text.

112. See cases cited *supra* note 15 and accompanying text.

113. See cases cited *supra* note 15 and accompanying text.

114. See, e.g., *HSBC*, 2014 WL 4276420 at *3, citing *Nomura II* ("By establishing all-purpose time limits for any actions [the agency] may wish to pursue, the Extender Statute displaces *all* preexisting limits on the time to bring suit, whatever they are called...").

115. *Nomura II*, 764 F.3d at 1203; see also *NCUA v. Morgan Stanley & Co.*, No. 13CV6705 DLC, 2014 WL 5017822 (S.D.N.Y. Sept. 30, 2014) (explaining that the doctrine of obstacle preemption applies to the Extender Statute, so as to preempt any conflicting state time limits.).

its capacity as a government entity.¹¹⁶ In addition, the Court re-emphasized the tenet set forth in *Erie Railroad Company v. Tompkins*: “[t]here is no federal common law.”¹¹⁷

Invoking the doctrine of “*inclusio unius, exclusio alterius*,” Justice Scalia explained that FIRREA is limited by its explicit terms.¹¹⁸ To emphasize this fact, Justice Scalia pointed to the Extender Statute itself as an example of how FIRREA contains very specific rules regarding both claims and defenses. Where the FDIC is acting in its capacity as a receiver, it is not exerting the claims of the federal government, but is merely exerting those rights that the failed bank had as of the date it was taken into receivership.¹¹⁹ Although the Court acknowledged in dicta that “deplet[ion] of the deposit insurance fund” could potentially be considered a significant federal policy interest, the Court held that—at the time—the FDIC had set no limits on the reserve fund.¹²⁰ Therefore, the Court held that the FDIC as receiver had no “specific, concrete federal policy or interest that [was] compromised by [state] law.”¹²¹ Accordingly, in a receivership situation, “any defense good against the original party is good against the receiver.”¹²²

In viewing the Federal Extender statute through the lens of both *Waldburger* and *O’Melveny & Myers*, three points become clear: first, the text of the Federal Extender statute is limited only to that text explicitly stated on its face; second, the Supreme Court does not appear willing to expand the power of the federal agencies beyond that specifically granted by Congress; and third, the Supreme Court has shown its willingness to dismiss claims against potentially culpable parties at the expense of injured plaintiffs, rather than legislate from the bench.¹²³

116. 114 S. Ct. at 2054.

117. *Id.* at 83 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

118. *Id.* at 86.

119. *See id.* at 85 (“...the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of [the failed bank.]”).

120. 114 S. Ct. at 2055. The Dodd Frank Act has now set the limits on the Reserve Fund. The question of whether this would alter the modern day analysis is dubious, at best, however, because the section where Justice Scalia notes the potential validity of the argument is written in another section of the case drafted on the alternative assumption that FIRREA does not apply. For information on the new limits required by the Dodd Frank Act, *see* FDIC: Deposit Insurance Fund Management (Oct. 9, 2014), <https://www.fdic.gov/deposit/insurance/fund.html>.

121. 114 S. Ct. at 2055.

122. *Id.* at 2054.

123. *See generally O’Melveny & Myers*, 114 S. Ct. 2048; *Waldburger*, 134 S. Ct. 2175.

Regardless of the fact that the courts interpreting the NCUA and FHFA statutes attempt to distinguish the text of the Extender statute from CERCLA section 9658, these courts cannot escape the large shadow *Waldburger* casts. The Court's generally dim attitude toward expanding the term "statute of limitation" to include "statute of repose" is equally applicable to the Extender statute as it was to CERCLA section 9658.¹²⁴ In fact, it could be argued that the case for finding preemption was even stronger in *Waldburger*, where legislative history acknowledged that state statutes of repose posed the same problem with discovery of harm as did the statutes of limitations. Still, the Court in *Waldburger* refused to expand its interpretation to include the statute of repose.

Although the *Nomura II* court explained that Congress' failure to mention statutes of repose in FIRREA's legislative history actually supports its conclusion that the Extender statute is a "universal timeframe," it is evident that the courts are splitting hairs.¹²⁵ In describing why the Extender statute preempts all potentially conflicting state time limits, the court reasoned that CERCLA section 9658 merely creates specific exceptions to state rules, while the Extender statute's different structure acts as a blanket that "displaces *all* preexisting limits on the time to bring suit, whatever they are called."¹²⁶ The problem with this argument is that it overlooks the reasoning in *O'Melveny & Myers*, in which the Court held that FIRREA cannot be "supplemented or modified by federal common law"; to do so "is not to 'supplement' this scheme, but to alter it."¹²⁷ The courts holding that the NCUA and FHFA Extender statute are "universal timeframes" therefore take an expansive approach to a statute that the Supreme Court has already cautioned is to be read narrowly. In conjunction with the Court's decision in *Waldburger*, that explicit preemption of a statute of limitations is not enough to also preempt a statute of repose, this is a surprising stance.

Perhaps another reason these courts come down on this side of the fence is the result of an unspoken policy issue. That is, it simply feels *wrong* to allow Wall Street to escape unscathed, while the merits of the cases remain unaddressed. Should the state statutes of repose be permitted to control, then the search for a culpable party

124. See generally *Waldburger*, 134 S. Ct. 2175.

125. See *Nomura II*, 764 F.3d at 1208. In distinguishing the Extender Statute from CERCLA, the Court purposefully points out that "[t]he Extender statute creates 'the applicable statute of limitations' for 'any action brought by' NCUA on behalf of a failed credit union." It would seem as though by simply placing the emphasis on the word "limitations" rather than "the," naysayers could find support for arriving at the opposite result. *Id.*

126. 764 F.3d at 1208.

127. 114 S. Ct. at 2054.

ends prematurely, with little to no answers. Unfortunately for the courts interpreting the NCUA and FHFA extender statute, this was the *Waldburger* dissenting argument, not the majority.¹²⁸ Although Justice Ginsberg's dissent argued "that 'certain State statutes deprive plaintiffs of their day in court' ... [by] thwart[ing]"¹²⁹ Congress's remedial intent, the majority held that "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem."¹³⁰

In conclusion, the *Waldburger* court explained that "[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them."¹³¹ Because the Court has already decreed that FIRREA—like CERCLA—must yield to state law when the federal statute is silent on the subject, so too must the Extender Statute yield to a state statute of repose. Until Congress speaks on the topic of state statutes of repose, it is unlikely the Supreme Court will find preemption in its silence.

IV. CONCLUSION

In conclusion, Congress should take immediate action to review the text of the Federal Extender statute and lend clarity as to its intentions. Lacking any action from Congress, the federal courts—courts of limited jurisdiction—cannot simply create a federal common law to read a "universal time limit" into a statute that refers solely to a statute of limitations.¹³² Because FIRREA (and, by implication HERA and FCUA) necessarily rely on state law provisions to supplement their text, the Extender statute only preempts the state statute of repose if Congress explicitly states that it does.¹³³ Congress has so far failed to do so, and accordingly, the federal

128. See *Waldburger*, 134 S. Ct. 2175.

129. 134 S. Ct. 2191.

130. *Id.* at 2185. Compare *id.* at 2188 (explaining that the "level of generality at which [CERCLA's] purpose is framed affects the judgment whether a specific reading will further or hinder that purpose." Where a statute "does not provide a general cause of action for all harm...[and] leaves untouched States' judgments about causes of action, the scope of liability, the duration of the period provided by statutes of limitations, burdens of proof, rules of evidence, and other important rules governing civil actions," the statute is not a "complete remedial framework."); with *O'Melveny & Myers*, 114 S. Ct. at 2054 (explaining FDIC's argument that FIRREA generally gives it "a nonexclusive grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law ... is demolished by those provisions of FIRREA which specifically create special federal rules of decisions regarding claims by, and defenses against, the FDIC as receiver.").

131. *Waldburger*, 134 S. Ct. at 2188.

132. See *supra* note 130.

133. See *supra* note 130.

courts—like the Supreme Court in *Waldburger*—must construe the Extender Statute merely as a statute of limitations, and not repose.

Regardless of whether the result feels right or not, this standard interpretation of the Extender Statute is necessary to provide uniformity in the law and avoid piecemeal litigation. It's necessary to uphold notions of comity, and—ultimately—puts the onus to legislate on Congress, upon whom the task of lawmaking properly rests.

